for The Defense

The Training Newsletter for the
Maricopa County Public Defender's Office

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Maricopa County Public Defender

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Are Public Defenders Doomed to be Werewolves? Part III on Openings

by Christopher Johns

"If you go to the zoo, always take somethin' to feed the animals--even if the signs say 'Do not Feed Animals.' It wasn't the animals that put them signs up."[1] Jurors didn't make the rules about openings either, and sometimes we forget this simple point. If you want your jury to understand your case--stop thinking like a lawyer. Prepare your case like a juror.

More importantly, stop thinking about the opening (and the case in general) alone. You know, like a werewolf that just does his own thing.[2] That's the advantage of case review and any other method of getting others' ideas.

Brainstorming

One of the best techniques for developing ideas for an opening statement is "brainstorming." Brainstorming is done by a group to attempt to find a solution to a specific problem by amassing all of the ideas spontaneously contributed by its members. And, if you can't get a group together to brainstorm, at least spend some time in a formal brainstorming process yourself. Remember, it's the process that's important--that's why there should be some structure to it.

The process is simple. Gather all of the information on your case. If you are brainstorming as a group, everyone needs to be familiar with the basic facts. Then list as many ideas, without judging them, as possible. In other words, don't evaluate the ideas at first. Just list them. No idea or thought on the opening should be rejected. Anything goes, at least at first. Only after you have listed all of the ideas that may be thought of should you begin the evaluation process. Then decide which ideas you like best and that most closely fit your theory of the case.

Preparation

During the preparation process it is important to spend time crawling into a jury's head. It is the jury you must persuade. Prepare in a way that anticipates jurors' concerns and thoughts.

Record your first impressions about the case. They are likely to be similar to a juror's. Consider using a "stream of consciousness" note-taking form. Jot down all your thoughts that come to mind about the case. Even

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unworkable thoughts may create ideas for an approach that contains a winning argument. Since these thoughts may come at any time, keep a pen and paper handy so that you can record them.

Make a juror question list. List all the questions that your jurors may have about the case. Don't dodge the hard questions. For example, if you think the jurors will ask why your client didn't testify, you need a plan to deal with that. Another example is the infamous police photograph. If you think the jurors will wonder where the picture came from, you better think of a way to deal with it in opening, direct, cross or closing.

You must have a theory of the case.

Also create a juror emotion list (more about this later). What will your jurors feel when they hear the facts of the case? Which emotions work for you? Which ones will the prosecutor use? Remember, the word is "feel" not "think"!

The whole point of this exercise is to answer as many questions as you can for jurors in your opening. Help the jurors make up their minds, early, instead of waiting until the end of the trial to try to change their minds. When doing this also consider the fact that the most important question you usually have to answer for the jurors is "why?". Whenever possible, in your opening (avoiding argument--of course) answer the "why" question. For example, if you think jurors will wonder how the victim could be mistaken--plan to show them the facts that prove mistaken identity and the reason for it. The why!

for The Defense

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for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. ***for The Defense*** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

Theory of the Case

If you've just been dodging silver bullets in your cases, remember this: You must have a theory of the case. What is the theory of the case? Your theory of the case should be a one-sentence factual explanation of your client's innocence. It may be legal or factual. It must be said in non-lawyer language. Remember, lawyer language or "prosecutor- and police-speak" is not allowed. Period. For example, your theory of the case may be that your client is innocent because the client had to shoot the alleged victim because he would have killed her. Perhaps your headnote for the case may be: "This is a case about kill or be killed."

One thing is for certain. Your theory of the case must emphasize your strengths and the prosecutor's (case) weaknesses. And, everything you do in your case must advance your theory. Okay, sometimes that's hard. At least it should not detract from it in any way. Your opening statement is the first time to present your theory of the case.

Themes

Just having a theory of the case is not enough. Going back to your juror emotion list, start thinking about the underlying themes that almost every case has. Themes are factual and emotional subsets of your theory of the case. Themes make up your theory. They are like individual, component parts that help create the emotional tone for the whole trial.

For example, if your theory is self-defense, some of your themes may be 1) the dead person was a nasty, gnarly bully with a long history of abusing your client; 2) the client lived in fear for her life and is the real victim; 3) the client had no other option; and 4) the client is a decent, caring soul.

Using your themes, think about what you want your jurors to believe and feel when you finish your opening. You should have two objectives: factual and emotional. The factual objectives should create the parameters for advancing your theory of the case. The emotional objectives should leave your jurors feeling most receptive to your theory of the case. Remember, if you are unclear about your factual and emotional objectives, most likely your jury will also be.

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One way to create the factual and emotional objectives is to create a list of the 10 best words that describe your case. Don't be afraid to be descriptive--perhaps even poetic.

Along that same line, develop a slogan. The case slogan is an attention-getting, easily remembered and frequently repeated statement that captures the emotional and factual content of your case theory. For example, in the self-defense case we've been discussing, the slogan may be "No Way Out," or "Nowhere to Run, Nowhere to Hide." The best places to find slogans are television programs, commercials, advertisements, music, literature, poetry, the Bible, and children's stories (to name just a few). Be creative. Remember, the right slogan may so encapsulate your case that it becomes easy for the jury to understand. The slogan may even be sarcastic in some circumstances ("Brutus is an honorable man").

Themes are factual and emotional subsets of your theory of the case.

Weaknesses

Last point: disclosing weaknesses. This is one area that, frankly, isn't as clear-cut as the above thoughts. There is some disagreement about whether you should disclose weaknesses in your opening. The issue is whether you want to take the sting away from the prosecutor. The sponsorship theory suggests, however, that you do not disclose weaknesses. The argument is that the jurors will think, "If they are admitting that much, imagine how bad it really is."

Another thought was given to me by a long-time criminal defense attorney. Her view is that we sometimes just give prosecutors "too much credit." In other words, maybe the prosecutor doesn't know or plan to bring up the issue in question.

If you do plan to disclose weaknesses, consider the following thoughts:

1) Only disclose weaknesses that you are sure will come out.

2) Minimize the weaknesses by discussing them briefly (the more time you devote to it, the more important it will appear).

3) Good before the bad (not enough room here--but trust me, research shows that's the way to go).

4) Present your weaknesses in the best possible light.

You don't have to be a werewolf. Howling alone in the wilderness isn't always a good idea. There's help out there for your opening, if you look around.

Dare we try closings next?

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[1] From *The Wit and Wisdom of Forrest Gump* by Winston Groom.

[2] As you know, a werewolf is a person transformed into a wolf or capable of assuming the shape of a wolf at will. The problem with public defenders is that we often are so isolated in the criminal justice system that we develop a lone-wolf mentality. This goes not only for how we present our cases, but also our unwillingness to be players in the system and in the community. But that's another article. Ω

"May It Please The Court...," or Why I Stopped Worrying and Started to Love Lawyerisms

By Donna Elm

In the last issue of *for The Defense*, an article on opening statements urged defense counsel to give up meaningless, formalistic lawyerisms. In particular, we should avoid "May it please the Court, Mr. Prosecutor, Ms. Defendant, and ladies and gentlemen of the jury...". Indeed, there is nothing of substance to that opening. But we should not completely abandon that litany. Much more than the substance of those words is communicated when we open that way.

The percentages cited may vary, but experts will tell you that the *substance* of what we say is only a small fraction of communication. The lion's share is presentation, charisma, audience, receptivity, environment, and *process*.

Process refers to how a person affects others' feelings about or relationship with him when interacting with them. Process is what we are communicating outside of (and sometimes contrary to) the words we say. You may

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have seen a defendant after a harsh sentence sneer at the judge and swagger off, saying sarcastically, "Oh thank you, your Honor." The substance of his communication was "thanks;" but the process clearly was "buzz off" -- a public display in the power struggle: "You can send me to prison, but you'll never control me." If the judge responds with 30 consecutive days for contempt, the process communicated is "I'm not going to let the likes of you challenge my authority in public."

Process is critical to communicators (like trial lawyers). We have to respond to the process every bit as much as to the substance of what the prosecutors communicate to juries.

Which brings me back to "May it please the Court...". When a prosecutor uses that language in opening, he communicates by process that:

1) I'm a real, professional lawyer (since I can speak lawyerly language);

2) I respect the judge and jury (in fact, I'm a respectful kind of guy);

3) I'm a good sport (because I am respectful to my opponent, too).

Combined, the process effect is to develop a relationship of trust between the prosecutor and jury. Consequently, the jury starts to like him and wants to believe his story.

The defense opening follows. We must immediately wrench that trust from the prosecutor. Whether we succeed depends on whether we also can establish that we are real lawyers, respectful, good sports, and on equal footing with our "worthy opponents" -- or whether we are just uncivilized cads.

If we launch right into the juicy facts or the hot issue of trial, we fail to seize that early trust relationship. The jurors perceive us as less professional, educated, and respectful to them. In other words, we have established that we are schmucks. We may have delivered the punch about our facts right away, but the jury is less inclined to buy it or even listen to it now.

It takes 15 seconds or less to say the "May it please the Court" line. We can deliver the punch about our facts immediately after without really losing their effect.

So, when the State opens with "May it please the Court...", we should follow suit. In fact, we should deliver that line even more formally and ritualistically that the prosecutor did. The words' substance may be boring and unpersuasive, but the process of cultivating a positive, trustworthy relationship with jurors pays off. Ω

A Case For the Books:
State of Arizona v. Joe D. Cornell

A recent Arizona Supreme Court case has stirred interest in the legal community because of the Court's unusual action of reporting the prosecutor's conduct to the State Bar for possible disciplinary proceedings.

The 1989 case involved a defendant who stalked and killed his ex-girlfriend (the mother of his child). During the same incident, the defendant also shot and wounded her father. At the scene of the shootings, the defendant threatened one or more people with his gun as he fled so that they would not interfere with his escape. Before trial the defendant chose to represent himself and a Maricopa County Deputy Public Defender (Steve Avilla) was appointed as advisory counsel. Defendant's defense at trial was that he had suffered a form of temporary insanity during the shooting. Defendant was convicted of first degree murder, attempted first degree murder, aggravated assault, and first degree burglary. The trial court sentenced him to death on the murder conviction and imprisonment on the remaining counts.

The Arizona Supreme Court reduced the death sentence imposed by the trial court to a life sentence. The Court found that an assault conviction used as an aggravating circumstance at sentencing no longer applied since the matter had been retried and the defendant had been convicted of a misdemeanor disorderly conduct. Also, considered was the fact that the defendant refused an attorney and represented himself until the last moment before sentencing (when the defendant asked the advisory counsel to serve as his advocate). The Court noted the existence of " . . . a substantial question in our minds whether the record contains all of the mitigating evidence that could or should have been presented to the court."

Additionally, the Court chastised the prosecutor for his actions at the 1990 trial.

> "The prosecutor asked Defendant's expert witness questions designed to convey to the jury that a verdict of not guilty by reason of insanity would result in Defendant's immediate release:
> Q. [K.C. Scull, Deputy County Attorney]: So, in other words, even though you assumed that he shot Daphne Dad, shot her father and did whatever else he did by way of aiming the gun around, he should walk out of the courtroom today a free man?
> A. [Dr. McMahon, psychologist]: That's not my decision to make, Mr. Scull. That's the jury's.
> Q. That's the ultimate result if we follow your conclusion, is it not?
> . . .

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A long line of our cases has held that this type of statement is improper. . . . This view has long prevailed in virtually all jurisdictions. . . . The vice in the present case was that the questions called the jurors' attention to the issue of disposition, a matter with which they were not to be concerned. . . .

The prosecutor's questions, therefore, raised an issue that was at once irrelevant and, as noted by many of the cases cited above, prejudicial. We must say that this experienced prosecutor should have known better than to make such remarks, and his actions seem almost calculated to bring prejudicial and irrelevant matters before the jury. His conduct jeopardized the proceedings.

"We must say that this experienced prosecutor should have known better than to make such remarks, and his actions seem almost calculated to bring prejudicial and irrelevant matters before the jury."

. . .

During the same cross-examination of Dr. McMahon, the prosecutor asked questions implying that advisory counsel coached Defendant to feign symptoms of epilepsy. . . . After a weekend trial break, however, advisory counsel asked the court for permission to withdraw so he could testify to rebut the insinuation that he had coached Defendant to feign having had an olfactory hallucination after the killing. The court agreed that this was the prosecutor's intended insinuation, and the prosecutor did not deny this. However, the court refused to allow advisory counsel to withdraw, ruling that the prosecutor would instead be precluded from making the coaching argument to the jury. . . .

We agree with the trial court that the prosecutor undoubtedly intended these questions to place in the jurors' mind the idea that advisory counsel coached Defendant on how to feign this symptom of temporal lobe epilepsy. We have repeatedly held that a prosecutor must not make prejudicial insinuations without being prepared to prove them . . .

We find no indication in the record that this prosecutor had any evidence to back up his accusation. In addition, the comments unfairly cast aspersions on advisory counsel's integrity. We strongly disapprove of such conduct by an experienced prosecutor, and we remind the bar that this kind of misconduct can result not only in reversal, *see, e.g., Holsinger*, 124 Ariz. at 21, 601 P.2d at 1057, but can also have serious personal consequences.[10]

Moreover, we are concerned that his conduct, and the conduct discussed in the previous section, evinced an attitude by the prosecutor that he could take advantage of the fact that Defendant was representing himself. . . .

a defendant's invocation of the right to self-representation does not signal playtime for prosecutors. **Prosecutors have a duty to do more than convict defendants. They have a duty to see that defendants get a fair trial."** [emphasis added]

In addition to focusing on the prosecutor's misconduct in trial, the Arizona Supreme Court in its written decision made some interesting points on "hybrid counsel."

At trial, the defendant asked the court to allow his advisory counsel to conduct the direct examination of his psychological expert.

"The prosecutor had no objection. However, the judge stated, 'Case law provides that you can't have hybrid counsel . . . and I'm not going to let that occur in this case.' Hybrid counsel is concurrent representation by both defendant and counsel. . . . Neither our cases nor any applicable law *prohibits* hybrid counsel. Rather, we have merely held that it is not a constitutional *right*. *Cf. State v. Stevens*, 806 P.2d 92, 97 (Or. 1991) (accused has no right to hybrid counsel but court may permit in its discretion) . . . We have never forbidden courts to allow a defendant to act as co-counsel, and some Arizona courts have done so . . . Whether to allow such hybrid representation remains within the sound discretion of the trial judge. *Evans*, 534 F.Supp. at 797 n.9. Thus, the judge in this case could have allowed advisory counsel to examine this crucial witness.[2]"

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[2] . . . . Although we recognize the trial judge's power to permit hybrid representation, in the sense of allowing advisory counsel to participate at some point in the trial and for some specific reason, *see, e.g., Cannon*, 127 Ariz. at 148-49, 618 P.2d at 642-43, we hasten to add, as advisory counsel said in this case, that such a procedure is disfavored. It is likely to create many procedural problems and should be adopted only for very unusual, and specific reasons, and when necessary to serve the ends of justice."

. . .

[10] We note again that we do not punish the public because of the misdeeds of its lawyer. However, we also do not allow seriously improper conduct to go unreported. *Valdez*, 160 Ariz. at 14, 770 P.2d at 318. This matter will be reported to the State Bar. Ω

Blood, Hair and Heredity

DNA Evidence can finger a murder suspect--or set him free

From NEWSWEEK, July 11, 1994,
by Sharon Begley with Ginny Carroll in Houston and Karen Springen in Chicago.

The murder of Nicole Simpson and Ronald Goldman seems tailor-made for DNA fingerprinting. There are no known witnesses to the two bloody killings. No murder weapon has been recovered. Detectives have not reported finding any standard fingerprints at the crime scene, and as a result the case against O.J. Simpson remains largely circumstantial. Those are exactly the sort of gaps that spurred British geneticist Alec Jeffreys to invent, in 1984, what has been called the magic bullet of criminal investigations. All a crime lab has to do is compare, say, the DNA of a murder victim to DNA in blood on a suspect's clothes. If the samples do not match, the suspect likely walks. If they do, DNA has fingered him.

Since it was first used in the United States in 1987, some 24,000 cases have involved DNA evidence. In 30 percent, it has cleared people mistakenly suspected of crimes. It has even freed from prison about a dozen men wrongly convicted of rapes or murders, and helped bring guilty verdicts or pleas in thousands of other cases. In April, Virginia carried out the nation's first execution of a murderer convicted largely through DNA fingerprints. The power of the prints comes from their precision, which is immensely greater than standard analyses of blood, semen or hair (chart). Police have reportedly tested blood at the murder scene and found that it includes O.J.'s type. No one has said whether it is A, B, AB or O, but at least 13 million other people share every blood type and those numbers are unlikely to sway a jury. But DNA tests could. Prosecutors will compare DNA in blood scraped from the crime scene to Simpson's DNA, and DNA in hair from a blue knit cap discovered at the murder scene to DNA in O.J.'s hair. If the judge allows it, the district attorney will also test blood found in Simpson's house and Bronco to Nicole's and Goldman's DNA.

The defense insists on running its own DNA tests--for good reason. Although DNA fingerprinting has attained mythic status in the public mind--one critic calls it "a fist on the scales of justice," outweighing all other evidence--it isn't an infallible crime solver. It is problematic enough that the very term has been disallowed in some courts, replaced by "DNA typing" or "DNA profiling" so jurors are not bedazzled into thinking that DNA evidence is as unambiguous as an ordinary fingerprint. That's because DNA tests do not compare every one of the 3 billion chemical units of a person's heredity. (If they did there would be no dispute that a match is a match: DNA is unique to every individual except identical twins.) Instead, the tests compare only three to six regions of DNA.

Here's how it works: technicians extract DNA from blood, semen or hair cells. They dissolve it in enzymes that act like chemical scissors, snipping the DNA molecule into thousands of pieces, explains Mark Stolorow of Cellmark Diagnostics in Maryland. The lab then separates the pieces by size. The pieces are exposed to special radioactive probes that home in on specific DNA landmarks on the pieces. X-ray film reveals what size piece each landmark falls on. The whole process takes at least a month and results in a DNA fingerprint that looks like a blurry version of a grocery product's bar code, all lit up with radioactive probes at certain spots on each "bar" of the "code." Finally, the lab compares that fingerprint to the fingerprint of another sample--say, blood on a murder suspect's clothing to blood from the victim. If they match, FBI and other experts claim, the odds are overwhelming that they came from one person: the probability of finding a match by chance is 100 million to 1.

If prosecutors find no incriminating DNA matches, the case against O.J. is dramatically weakened. Exculpatory DNA evidence has proved more powerful even than eyewitness testimony. Last year Walter (Tony) Snyder was released from a Virginia prison after serving seven years for a 1985 rape that new DNA evidence said he did not commit, even though the victim identified him at the trial. "DNA is often portrayed as a tool of the prosecution," says Keith Brown, president of the DNA testing lab GeneScreen in Dallas, "but it has done far more for defendants."

Even if DNA tests do turn up a match between, say, Goldman's blood and blood in Simpson's Bronco, it does not mean O.J. is as good as convicted. The defense can challenge DNA on several fronts:

■ **Admissibility.** The first hurdle for the prosecution will be to persuade a judge to allow DNA results as evidence. Four state high courts (Washington, Arizona, Vermont and Massachusetts) have ruled DNA evidence inadmissible until scientists agree on its precision. Twenty-two others have decided it can be introduced. California case law is contradictory. One of its appellate courts upheld the admissibility of DNA evidence and two threw it out, all in 1992. The fight over admitting DNA evidence will be one of the most important in the entire case.

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The Frontiers of Forensics

	 Finger-print	 Blood	 Hair	 DNA
How it Works	Experts compare the pattern of ridges and whorls.	Serologists compare proteins and antigens that can vary from person to person.	A crime lab compares the color, shape and microscopic characteristics.	Technicians compare 8 to 6 regions of DNA obtained from blood, semen or hair.
Theoretical Accuracy	Perfect: no two fingerprints are identical.	Varies: 1 out of 2 people are type O. But only 1 in 1,000 share all 9 proteins typically tested.	Poor: can identify race but not individuals.	Hotly debated: only 1 in millions may have the same patterns.
Admissibility	In all states	In all states	In all states	Varies by state
Possible use in O.J. case	None have been reported.	Samples from murder scene were tested.	Tests run on hairs found in glove and caps.	Samples from O.J.'s house, car and crime scene may be tested.

■**Methodology.** Unlike labs that test for alcohol or drugs, DNA labs are not required to meet any standards. And the complicated science offers many chances to botch the job, as O.J.'s lawyers are sure to tell the jury. The first concern is contamination. "Say some material is recovered off a driveway," says Jonathan Koehler of the University of Texas. "When the lab is setting up the test, [the technician] accidentally dribbles some of the defendant's blood into . . . the driveway blood. You're going to get a match. It's happened." In one 1989 proficiency test, human errors occurred in two of 150 DNA samples. (Labs say the error rate is now much less.) That error rate is what jurors should hear, argues Koehler, not the million-to-1 number sometimes claimed for DNA's precision. Which of the competing figures a judge allows jurors to hear could strongly influence how persuasive they find any evidence.

■**Interpretation.** If experts testify that there is only one chance in millions of an incriminating DNA fingerprint being wrong, the defense should pounce. The FBI calculates that kind of likelihood by extrapolating from the 3,000 DNA samples in its database. But defense testimony could undermine such assertions. In a 1991 paper, Harvard University geneticists Richard Lewontin and Daniel Hartl argued that in some population groups the chances of two people having the same DNA profile are higher: the huge odds against a false match could be grossly overstated. Other geneticists agree that the precision of DNA tests might vary by ethnic group, but they say it is hardly relevant. "There may be a question about whether [the chance of a false match] is 1 in 100,000 or 1 in a billion," says geneticist Victor McKusick of Johns Hopkins University, who headed a 1992 panel of the National Academy of Sciences that endorsed DNA fingerprinting. "It is a nonissue."

But for one jury it was very much an issue. In a 1992 California rape trial, prosecution witnesses put the chance of a false DNA match in a semen sample at 1 in 189 million; defense experts testified that it could be 1 in merely 65,000. The statistical dispute raised enough doubt that the defendant was convicted only of attempted rape--and jurors said he would have been acquitted outright had he not lived next door to the victim. That's a lesson Simpson's defense team would do well to remember: even if they successfully sow doubt about the DNA tests, the jury will still be weighing other evidence, too.

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Immigration Consequences: By The Time I Get To Phoenix. . .

By Robert J. McWhirter* & Christopher Johns

By the time our non-citizen clients get to Phoenix, a criminal conviction may have devastating collateral immigration consequences (See *for The Defense* article "Immigration Law and the Public Defender", Vol. 4, Issue 3, Pg. 5). As the United States Supreme Court noted in *Jordan v. DeGeorge*, 341 U.S. 223 at 231 (1951), "[d]eportation is a drastic measure, and at times the equivalent of banishment or exile. . . ."

For the non-citizen client, a criminal defense lawyer needs to factor in the consequences of the client's immigration status when negotiating any "deal" or evaluating a trial for the best result for the client. Sometimes, deportation or exclusion may be much more harmful to the client than a criminal conviction.

Absent a dismissal or an acquittal, there are some ways to structure the client's criminal case outcome to minimize, and in some cases completely avoid, devastating immigration consequences.

Basically, there are several goals practitioners should consider when representing non-clients. They are:

1) Get as much information about the client's immigration status as possible as soon as possible in the case.

2) Inform the client as fully as possible of the immigration consequences that may flow from her criminal conviction.

3) Strive to avoid creating grounds for deportation or exclusion in negotiating a settlement.

For the non-citizen client, a criminal defense lawyer needs to factor in the consequences of the client's immigration status when negotiating any "deal" or evaluating a trial for the best result for the client.

In reaching number three, consider the following:

General Considerations:

1) Negotiate a plea where your client can avoid an actual finding of guilt.

2) For juveniles, plea the client to an allegation of juvenile delinquency.

3) Ask the court to suspend imposition of a prison sentence rather than imposing a prison sentence and then suspending the execution of that sentence.

4) Have the conviction vacated or obtain an expungement or pardon of any conviction.

Moral Turpitude Crimes:

5) Negotiate a plea to a crime that is not one of "moral turpitude" (crimes of moral turpitude are listed at pg. 17-852 in *Defending a Federal Criminal Case* and *Immigration Law and Crimes*, National Lawyers Guild, Clark Borman 1990, Appendix E). Generally, one felony conviction for a crime of moral turpitude or two misdemeanor convictions for a crime of moral turpitude makes a resident alien deportable.

6) If the defendant must plead to multiple charges, try to have the plea agreement reflect that they arise out of a single scheme of criminal misconduct and have the defendant simultaneously sentenced on the multiple convictions. This may avoid having the two convictions counted as two separate convictions for crimes of moral turpitude. If this is not possible, ask the court to make a written finding on the record and on the judgment and sentence that the crimes arise out of a single scheme of criminal misconduct.

Aggravated Felony Crimes:

7) Negotiate a plea to a non-aggravated felony. Aggravated felonies include "crimes of violence" and drug trafficking offenses. See 8 U.S.C. § 1101(a)(43).

8) Even if your client did a crime that involved violence, have him plead to a statute that

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does not have the elements of a "crime of violence." 8 U.S.C. § 1101(a)(43). This may help the client avoid being defined as an "aggravated felon" under immigration law and deported. Also, avoid the extra-bad facts ending up in the record.

9) In a drug case, have your client plead to a non-drug crime like misprision of a felony. In addition, it is very important that your client avoid any drug trafficking conviction because this defines him as an "aggravated felon" under immigration law and automatically deportable.

10) If the defendant must plead to a drug crime, see if the record may be kept quiet on the nature of the drug.

11) Avoid convictions for gun possession crimes. If your client pleads to a "deadly weapon" charge without any elaboration that the weapon is a firearm, it would help in immigration court. Deportation laws only focus on whether the conviction is for possession of a firearm.

Conclusion:

In a border state like Arizona, it is imperative the criminal defense attorneys determine client's immigration status as soon as possible and learn what the impact of a conviction will be on that status. The above checklist is by no means exhaustive. It is meant as a quick starting point. An excellent resource is Ira J. Kurzban's *Immigration Law Sourcebook*, 4th Edition (1994).

* Robert "Bob" McWirter is an assistant Federal Public Defender in Phoenix (379-3679). Ω

Editor's Note: Every now and then someone disagrees with the content of one of our articles. Note where there is a byline that the opinions of authors in our newsletter do not necessary reflect the official policies of the office unless the context otherwise makes it clear. You'll recall we were taken to task for our article on racial disparity in the TASC program. The following letter is critical of last month's article on discovery. If you have an egregious discovery problem with a prosecutor, please provide me the information (in writing) so that we may respond accordingly. Additionally, as the following letter suggests, the Maricopa County Attorney's Office's Chief Deputy may be contacted. Thanks.

August 8, 1994

Dean Trebesch
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Dean:

I am writing this letter in response to an article in the July issue of "For the Defense." The article written by Christopher Johns is entitled "The Prosecutor's Duty to Disclose: The Crying Game." The article suggests that the primary source of delay in the criminal justice system is the prosecutor's failure to provide prompt discovery. The article further suggests that the prosecution's lack of cooperativeness in providing requested discovery and exculpatory information, coordinating pretrial interviews and in timely responding to discovery issues make [sic] it difficult for public defender clients to obtain justice. Mr. Johns also takes a back handed [sic] slap at the judiciary for what he terms a "hands off" approach to discovery disputes.

I find Mr. Johns [sic] statements to be both self serving [sic] and naive. While disagreements among counsel involving discovery occasionally arise in the context of a criminal case, I sincerely hope that both sides work in a professional manner to resolve the issues. Furthermore, it has been my experience that the criminal trial judges attempt to handle these matters expeditiously whenever they are presented in

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a complete and forthright manner. In any event, I am unaware of any major problems involving discovery in the criminal justice system.

I would suggest that if any of your deputies have discovery problems on the scale suggested by Mr. Johns [sic] article, they should contact me directly. We will not tolerate gamesmanship when it comes to these issues and expect as much from your deputies.

Sincerely,

Paul W. Ahler
Chief Deputy
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PWA:bjb
8894c

cc: Richard M. Romley

The Honorable Ronald Reinstein
Presiding Criminal Judge

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Arizona Advance Reports

Volume 149

State v. Song,
149 Ariz. Adv. Rept. 3 (Sup. Ct. 9/28/93)
Trial Judge Kenneth L. Fields

Defendant was convicted of manslaughter, a class 3 dangerous felony. The trial judge found that he was on parole from a Hawaii felony conviction at the time of the offense. Defendant was sentenced to life imprisonment without the possibility of parole for 25 years. Defendant argues that it was improper to enhance his sentence because the Hawaii felony does not necessarily constitute a felony in Arizona. Defendant did not raise this claim in the trial court. Defendant claims that under the Hawaii statute you could be guilty for recklessly possessing a firearm while the Arizona statute requires a knowing mental state. The presumption is that conviction in the other state carried with it all the essentials of the crime in Arizona. If the contention is to the contrary, that is a matter which can and must be raised by the defendant. The issue as to the nature of the conviction as it relates to Arizona law is an issue of law which is precluded unless raised. By failing to contend that his Hawaii crime would not be a felony in Arizona, the defendant is precluded from arguing otherwise on appeal. [Represented on appeal by James L. Edgar, MCPD.]

State v. West,
149 Ariz. Adv. Rept. 5 (S. Ct. 9/30/93)
Trial Judge Thomas Meehan

Defendant was convicted of first degree felony murder and sentenced to death. The defendant robbed an elderly man, tied him up, and beat him severely on the head. The victim died shortly after the beating. Several days later, Illinois police stopped a speeding car. The defendant was a passenger. The defendant was arrested for murder.

Briefs

The Arizona Rules of Criminal Procedure call for opening briefs of up to 80 pages. Defendant requested permission to file a 286-page opening brief. Defendant was allowed to file a 150-page brief. Defendant claims that his right to due process was violated by limiting the length of his brief. The briefs in this case could easily have been filed within the parameters of the amended rules which provide ample opportunity for effective representation. If preservation is sought to avoid issue preclusion, brevity should be employed. Barring an advanced showing of the most extraordinary circumstances, the Supreme Court is committed in all future cases to enforcing the page limitations set by the rules.

Jury

Defendant argues that the trial court violated his rights by creating a conviction-prone jury when it excused seven jurors because of their alleged views on the death penalty. The record discloses that all these jurors were excused because they could not be fair and impartial. Defendant did not object when these jurors were excused and passed the panel at the close of voir dire. He is precluded from challenging the jurors on appeal. Defendant further argues that excusing these jurors violates Article 2, Section 12 of the Arizona Constitution. The Arizona Constitution provides that no person shall be incompetent as a

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witness or juror because of his/her opinion on matters of religion. A person whose religious beliefs prevent him/her from finding a defendant guilty, not withstanding proof beyond a reasonable doubt that the defendant is guilty, is not impartial and may properly be stricken.

Search of the Car

Defendant claims that the Illinois police conducted an illegal investigative search without a warrant. The trial judge found the search to be a valid inventory search performed incident to a lawful arrest. Defendant now expands his argument to claim that the inventory search was not conducted pursuant to established police procedures. The car was stopped for speeding and the driver arrested for driving while under the influence. Officers at the scene attempted to determine whether the car could be released to either passenger. When police radioed in information about both men, dispatch replied that defendant was wanted on an outstanding felony warrant. Defendant was arrested for murder, and the other passenger was detained because he was too drunk to drive. Under local police policy, the car had to be impounded because no occupant could legally operate it. The police policy was to inventory items in cars that were impounded. Defendant's duffle bag also was inventoried. Police may conduct inventory searches as long as they are conducted pursuant to standardized criteria and not because of mere suspicions of criminal activity. *Colorado v. Bertine*, 479 U.S. 367 (1987). The local police policy was to inventory property separated from the cars, including the contents. The trial court reasonably found this search to be a valid inventory search conducted pursuant to local police policy.

Victim's Suicidal Tendencies

Defendant contends that the trial court erred because he was not allowed to present evidence that the victim was suicidal and may have planned his own death. On a motion in limine, the trial judge ruled that it would not permit evidence of the victim's alleged suicidal tendencies without some showing of relevance. Defendant first claims that the trial court impermissibly burdened his right against self-incrimination by allowing this evidence only if defendant testified. However, the trial court merely stated that the defendant's testimony could make suicide evidence relevant. The trial court did not state that only the defendant's testimony could establish relevance. The evidence here was irrelevant under the facts of the case. The victim was beaten, hog-tied, and left to die. The evidence negates any possibility that the victim killed himself. The timeliness of the motion in limine was unimportant because a pretrial motion in limine is merely a convenient substitute for evidentiary objections at trial. A trial court may entertain late motions in limine because it may well consider them procedurally preferable to hearing objections piecemeal at trial.

Photographs

Defendant claims that the photograph of the victim was gruesome, had no probative value and was highly inflammatory. The picture was indeed gruesome but was relevant to issues at trial. The photograph corroborated the defendant's confessions to three witnesses. The photograph was also relevant to show that the death was premeditated or intentional.

Notice

Defendant claims that the state is required to give him notice of the crime charged and notice of the theory under which it will proceed at trial. While the defense is entitled to notice of the crime charged, the state need not provide notice of the theory of trial. Defendant further claims that the prosecutor misled him into believing that the state would proceed on a premeditated murder theory as well as a felony murder theory. Defendant claims that he was surprised and prejudiced by the state's election during trial to abandon the premeditation theory. The prosecutor must give notice of the charges. The rules of procedure thereafter provide for discovery. The prosecutor has no independent duty to tell the defendant how the state intends to proceed or to elect theories in advance.

Jury Instructions

Defendant contends that the jury should have been instructed on premeditated murder despite the state's withdrawal of that theory. Defendant claims that this would also require instructing on lesser included offenses of premeditated murder. There is no obligation to instruct the jury on theories withdrawn within the prosecutor's discretion. Due process entitles the defendant to instructions on any lesser included offenses but does not require the court to give instructions on crimes or theories no longer at issue.

Defendant contends that burglary is a lesser included offense of the felony murder in this case. It

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was not; but in any event, the jury was instructed on both burglary and felony murder, and defendant was convicted of both.

Defendant argues that due process requires that the jury be instructed on lesser related offenses. Lesser related offenses are offenses supported by the facts of the case although not included in the charging document. While some states recognize this doctrine, Arizona does not. The Arizona rule is consistent with federal practice. *See Schmuck v. United States*, 489 U.S. 705 (1989).

Defendant requested an instruction that the jury should acquit if they had a reasonable doubt about whether the defendant was at the scene. Jury instructions cover the applicable law, and are not comments on bits and pieces of evidence. The trial judge properly declined to give the requested instruction. Defendant also requested an instruction on proximate cause. Causation was not an issue in this case.

Defendant requested a *Willits* instruction based upon the state's alleged failure to test a knife found at the scene. The victim was not stabbed. The state did not lose or destroy the knife. The defendant has not shown how the knife could be exculpatory and the defendant did not take the opportunity to test the knife. A *Willits* instruction would have been inappropriate.

Defendant argues that the trial court erred by not defining "intentionally" and "in furtherance of," gave a reasonable doubt instruction that excluded possible doubt, and failed to instruct the jury that informer testimony is inherently unreliable. The defendant has failed to preserve these issues for appeal by making these objections at trial. No fundamental error occurred.

Judge's Conduct

Defendant complains that the trial judge's behavior prejudiced him. Specifically, the judge looked away from the jury during defendant's opening statement and was impatient with defense counsel during the defense case. Both parties are entitled to a trial presided over by a fair and impartial judge. There is no evidence in the record of bias by the trial judge. The defense's unsupported assertions do not substantiate a claim of judicial misconduct nor is there any showing of resulting prejudice.

Prosecutorial Misconduct

Defendant claims that the prosecutor committed misconduct. Because these issues were not raised at trial, all are precluded absent fundamental error. Defendant first claims that the state impermissibly commented on his failure to call a witness. Defense counsel promised to call "Shorty" to testify if the state did not. However, this witness was not called. All the state did was remind the jury in argument that defense counsel had not done what was promised. Defendant claims that the state engaged in misconduct by claiming questions by the defense counsel were a defense ploy, improper and outrageous. The argument was well within the wide latitude afforded both parties in closing argument.

The prosecutor stated during argument that defendant would be "ticked pink" if he were convicted of only one charge. Defendant claims that this is an impermissible statement of the prosecutor's personal opinion of the defendant's guilt. In the context of the case, the prosecutor's statement was within the latitude afforded attorneys in final argument and did not constitute fundamental error.

Defendant argues that the prosecutor impermissibly shifted the burden of proof. During closing argument, the prosecutor stated that the defense has to consider what to say, knowing there is a killing, but what's the explanation? The challenged statements could not possibly have affected the jury's view of the burden of proof and are not fundamental error.

Release of Juror's Names

After trial, the defense asked the judge to provide the names and addresses of the trial jurors. The defense contended they were entitled to investigate and see whether any juror was guilty of misconduct. The judge refused. The judge's refusal of this information was entirely proper.

Sentencing Issues

Defendant claims there was insufficient proof that his prior conviction was a proper aggravating factor under 13-703(F)(2). While no certified copy of the judgment of conviction was submitted, defense counsel stipulated that this conviction met the requirements of A.R.S. § 13-703. Defendant complained that he did not personally participate in this stipulation. However, it is well established that a defendant may be bound by his counsel's trial strategy decisions to waive even constitutional rights.

The Supreme Court agrees with the trial court's findings that the murder was especially heinous and committed for pecuniary gain.

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Defendant argues that the trial judge improperly disregarded several mitigating factors. The felony murder basis for the conviction is not a mitigating circumstance. The defendant also intended to kill or knew with substantial certainty that his actions would cause death. The defendant was not intoxicated at the time of the offense. His chemical dependency did not significantly impair his ability to appreciate the wrongfulness of his conduct. His failure to complete a drug rehabilitation program is not mitigating evidence. Defendant's age [28] is not a mitigating circumstance. The defendant's waiver of extradition is also not a mitigating circumstance.

The trial judge correctly found that the defendant had proven two mitigating factors: a substance abuse problem and a deprived childhood. These two mitigating factors are insufficient to overcome the aggravating factors and leniency is not appropriate. The trial judge also properly complied with *Enmund v. Florida*, 458 U.S. 782 (1982) in passing a death sentence in a felony murder case. Defendant was a major participant in the crime and displayed reckless indifference to human life. The jury's verdict also supplied the necessary finding that the defendant killed, attempted to kill or intended to kill the victim.

Defendant contends that the state is required to give him pretrial notice of the statutory aggravating factors that were relied on at sentencing. Due process requires only that the prosecution disclose aggravating circumstances sufficiently in advance of the hearing to allow a reasonable opportunity to prepare rebuttal. The disclosure of aggravating factors over three months before sentencing was sufficient notice.

Defendant also contends that the prosecutor committed misconduct at the sentencing hearing. The prosecutor's comment regarding eventual review of the sentence by the Arizona Supreme Court was not a plea for the judge to take his sentencing responsibility less seriously. Defendant also claims that the state's reference to his failure to call two psychological witnesses was prosecutorial misconduct. It was not misconduct for the prosecutor to point out that the defendant had not called the experts to testify, especially where the trial judge knew of their appointment.

Defendant claims that the presentence report included inadmissible information. The trial judge in a capital case must be presumed to be able to focus on the relevant sentencing factors and set aside the irrelevant and the inflammatory. Even if the material was inadmissible, defendant has not shown that the trial judge considered it and has not shown prejudice. The Supreme Court finds that the Arizona death penalty is constitutional and affirms the death sentence.

State v. Rowan,
149 Ariz. Adv. Rept. 19 (Sup. Ct. 9/30/93)
Trial Judge Richard Nichols

Defendant was tried on prostitution-related charges and found guilty. He indicated his desire to admit the allegation of a prior felony conviction. Defendant claims that his admission of a prior felony conviction was involuntary because the trial court did not advise him of the consequences if the trial judge also found that the defendant was on probation. The defendant's admission to the prior felony was unrelated to the trial court's separate finding that the defendant was on probation. Rule 17.2(b) requires the court to inform the defendant of the nature and range of possible sentence for the offense to which the plea is offered, including any special conditions regarding sentence, parole, or commutation. The later finding that the defendant was on probation was inapplicable and indeed irrelevant to the prior felony conviction proceedings, and discussion of these matters would have added nothing to defendant's intelligent, knowing, and voluntary waiver. The special conditions result from the defendant's probation status, not from the prior felony conviction that defendant admitted. [See also concurrence.]

State v. Varela,
149 Ariz. Adv. Rept. 22 (Div. 1, 10/5/93)
Trial Judge Steven D. Sheldon

Defendant was convicted on charges of sexual exploitation of a minor and solicitation of child molestation, and was sentenced to 97 years in prison. At trial, the state sought to introduce evidence that the defendant had previously molested another child to prove his emotional propensity towards sexually aberrant behavior. The state called Robert Emerick as their expert at the propensity hearing. Defendant argues that Emerick is not an expert medical witness as required by *State v. Treadaway*, 116 Ariz. 163 (1977). While a psychologist is qualified as a mental health expert, *State v. Bailey*, 166 Ariz. 116 (App. 1990), Emerick is neither licensed nor certified in either the medical or mental health fields. The expert's qualifications were insufficient. Evidence that a witness has worked with child abusers and their victims, regardless of the length of that experience, is simply not sufficient to permit the witness to render an opinion on this complex subject without an appropriate showing of recognized training, study, and certification.

In response, the state contends that no expert

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testimony is required for the admission of the prior bad act because the conduct is both sufficiently similar and near in time to the charged acts under *State v. McFarlin*, 110 Ariz. 225 (1973). In crimes involving sexual deviancy, proof of similar acts near in time to the offense charged may be admitted as evidence of the accused's propensity to commit such acts under *McFarlin*. While *Treadaway* was decided after *McFarlin*, it did not displace *McFarlin*. Reliable expert medical testimony is not always required before a prior act may be admitted pursuant to the emotional propensity exception. Where a prior sexual act is near in time and reasonably similar, the act speaks for itself and provides the basis for the exercise of a judge's discretion in determining relevancy. The prior molestations were both similar and near in time to these crimes. Admissibility is governed by *McFarlin* not *Treadaway*.

Defendant argues that the court erred by allowing its expert witness to testify at trial concerning child sexual abuse accommodation syndrome. Defendant claims that the witness was not a qualified expert. The qualification of an expert is a discretionary call of the trial court. While this same expert was not a qualified medical expert pursuant to *Treadaway*, his extensive experience qualified him as an expert to testify about this syndrome.

Defendant also claims that a *Frye* hearing was required before admitting this evidence. Testimony concerning general characteristics of child sexual abuse victims is not new or experimental scientific evidence and does not require the additional screening provided by *Frye*. No abuse of discretion occurred.

At trial, the state's expert testified about paraphilia. Defendant contends this testimony was error. The expert's testimony was objective and did not involve the defendant or his particular case. The trial judge did not err in admitting testimony from an individual with specialized knowledge on this topic.

State v. Haywood,
149 Ariz. Adv. Rept. 30 (Div. 1, 10/7/93)
Trial Judge Lawrence O. Anderson

The state brought a civil in rem forfeiture proceeding against the property of Mr. Haywood. At the hearing to establish probable cause, the state's principal witness gave hearsay information. The defendant moved to dismiss because the state had failed to establish probable cause. The trial court granted the motion, finding that the state's evidence was based upon unreliable hearsay. The state appealed.

In forfeiture hearings, the court shall receive and consider all evidence and information that would be permissible in determining probable cause at a preliminary hearing or before the grand jury. A.R.S. § 13-4310(E). At the hearing, the defendant argued that there is a requirement that any hearsay be reliable. The trial judge agreed finding that the state must comply with Rule 5.4(c) in presenting hearsay. The state claims that A.R.S. § 13-4310(E)(2) allows any hearsay statement without regard to reliability. The Supreme Court of Arizona has the exclusive authority to make court rules. A statute which infringes on the hearsay rules is subject to exacting scrutiny as an unconstitutional infringement on the separation of powers doctrine. If the statute were interpreted to require the trial court to admit hearsay of any character without regard to its reliability, the statute would be unconstitutional. Construing the statute so that it is constitutional, the proponent of hearsay evidence at a forfeiture probable cause hearing must demonstrate that evidence's reliability.

The state also argues that even excluding the hearsay, there was still sufficient evidence to establish probable cause. Whether a given state of facts constitutes probable cause is always a question to be determined by the court. Assuming the trial court believed all the evidence before it, there is at least a debatable issue on the question of probable cause. The court could have found something that casts suspicion on the witnesses' statements and used that determination to find a lack of probable cause.

Wilson v. Ellis,
149 Ariz. Adv. Rept. 39 (S. Ct., 10/5/93)
Commissioner Lindsay Ellis

Defendant's probation was revoked and he was sentenced to prison. On post-conviction relief, he requested a transcript of the probation revocation proceedings at public expense. The trial court found the defendant indigent but denied his transcript request. Defendant requests a free copy of the record. The state argues that the defendant must comply with Rule 32.4(d) before he is entitled to a transcript. The rule requires defendants to specify the portions of the record necessary to resolve the issues raised in the petition. The state also contends that the defendant waived his right to a transcript when he admitted a probation violation. Denying defendants a free transcript in this situation creates a disincentive to admit probation violations. While defendant gave up his right to a direct appeal by an admission, the defendant may still file a petition for post-conviction relief. Rarely can an effective attack on the proceedings be mounted without access to a transcript. Under Rule 32.4 the court shall order

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those portions of the record prepared that it deems necessary to resolve the issues to be raised in the petition. The transcript is necessary to resolve the issues to be raised in the petition. To interpret the rule otherwise would raise serious state constitutional issues.

State v. Romanosky,
149 Ariz. Adv. Rept. 41 (S. Ct., 10/5/93)
Trial Judge Marilyn A. Riddel

The defendant was convicted of first degree murder, armed robbery, and aggravated assault. He was given the death penalty for the murder. On the first day of trial, the trial judge preliminarily instructed the jury on the concept of reasonable doubt. Four days later, the jury was instructed. The trial judge did not reinstruct the jury on the reasonable doubt standard. The jury was given a written copy of the instructions, including the reasonable doubt instruction read at the start of trial. Defendant claims that the trial judge's practice of refusing to instruct the jury on the reasonable doubt standard at the close of the evidence is reversible error. Failure to instruct the jury at the close of evidence on the state's burden of proof after a request by the defendant is error. The jury was not instructed concerning the application of the doctrine of reasonable doubt to each element at the close of the case.

The state contends that defendant failed to preserve the reasonable doubt instruction issue for appeal. During trial, the trial judge informed the attorneys that she would not re-read the instructions given at the beginning of the trial. When the trial judge asked if there were any objections to the instructions already given or about to be read to the jury, defense counsel re-urged the requested instructions. The record made was adequate to put the trial judge on notice of her error in not reinstructing the jury on reasonable doubt. As this particular trial judge has been faulted for this same error several times before, any further request was both unnecessary and futile. The error was not harmless in this case and the matter is remanded for a new trial.

State v. Pennington,
149 Ariz. Adv. Rept. 59 (Div. 1, 10/14/93)
Trial Judge Michael D. Jones

Defendant was charged and convicted of two drug offenses and sentenced to concurrent prison terms. Defendant claims that he was improperly charged two time payment fees. Defendant was convicted twice for two different crimes. His two case numbers are separate cases and create double bookkeeping duties. The trial judge did not err in assessing two time payment fees.

Defendant claims he is entitled to one more day of presentence incarceration credit. The state responds that defendant should have received much less credit on one cause number because he posted bond and it was never rescinded. The state did not raise this issue by cross-appeal. The state is not required to file a cross-appeal to protect its rights in the event that a defendant successfully challenges the sentence imposed. As the defendant has challenged his sentences, the court has jurisdiction to consider whether the presentence incarceration credit was proper. Defendant is entitled to one additional day presentence incarceration credit because 1992 was a leap year. However, he will not receive presentence incarceration credit for both concurrent sentences because the sentences are to be served at the same time. [Represented on appeal by Carol Carrigan, MCPD.]

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State v. Fagnant,
150 Ariz. Adv. Rept. 3 (S. Ct. 9/28/93)
Trial Judge Ronald S. Reinstein

Defendant pled guilty to two felonies and was sentenced to prison. The state had initially filed an allegation of a prior Washington felony conviction. The presentence report stated that the defendant actually pled guilty in Washington to a lesser felony offense. The trial judge used the prior felony offense as an aggravating factor at sentencing. Defendant did not object. On appeal, defendant argues that it was inappropriate to use his prior conviction as an aggravating factor without a showing that it would be a felony in Arizona. Whether a non-Arizona felony can be committed in a manner that would not constitute a felony under Arizona law is a purely legal issue which is precluded unless raised. The defendant failed to object at sentencing and may not raise the issue for the first time on appeal.

State v. Hursey,
150 Ariz. Adv. Rept. 11 (S. Ct., 10/19/93)
Trial Judge William J. O'Neil

Defendant was convicted of a felony offense. The state alleged two prior felony convictions. The attorney who represented him on both of those

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convictions was now the prosecutor. After the jury found defendant guilty in the new case, a different prosecutor proved the two prior convictions.

The defendant filed for post-conviction relief alleging a conflict of interest. The state confessed error. Division Two of the Court of Appeals affirmed the conviction for failure to show prejudice. There was a clear conflict of interest in this case. *See In re Ockrassa,* 165 Ariz. 576 (1990). The prosecutor's conduct violated Ethical Rule 1.9 and there was substantial danger that confidential information previously revealed would be used against the defendant. While the ethical rules do not retain the former "appearance of impropriety" standard, it still has a definite place in the balancing test that the trial court must apply in resolving the question of disqualification. Public confidence is eroded where a prosecutor has a conflict of interest in the criminal case which he is handling. To prevent the perception or actuality of a breach of the confidentiality rules, reversal is necessary. A defendant should not be forced to attempt to prove that there was an actual indiscretion or impropriety. Evidence of such conduct, being under the control of the prosecution, would be nearly impossible for a defendant to bring forth. A new trial is the only plausible remedy.

State v. Day,
150 Ariz. Adv. Rept. 34 (Div. I, 10/21/93)
Judge Ronald S. Reinstein

Defendant and her co-defendant both pled guilty to kidnapping and related charges. At a consolidated sentencing hearing, the co-defendant testified but the defendant did not. The co-defendant gave statements that could be used in aggravation against the defendant. The state then cross-examined the co-defendant and he gave further testimony unfavorable to the defendant. At the end of his testimony, counsel for defendant wanted to cross-examine the co-defendant. Co-defendant's counsel objected. The trial judge did not allow the counsel for defendant to cross-examine the co-defendant. In her statement, the defendant maintained that the co-defendant was lying. Defendant was sentenced to an aggravated term on one count and a mitigated term on another, to run consecutively.

Defendant argues that he had the right to cross-examine the witnesses against him at the presentence hearing. A criminal defendant has an absolute right to cross-examine an adverse witness. While a judge in a presentence hearing is not required to follow the strict rules of evidence, the sentencing process must still satisfy the requirements of the due process clause. Due process requires that a defendant at a presentence hearing be allowed to cross-examine adverse witnesses. While the confrontation clause applies only to trials, this rule is not applicable once the state has produced a witness and allows him to testify. While the co-defendant was not actually called by the state to testify, prohibiting a defendant from cross-examining a co-defendant who has just made adverse comments would not be consistent with the basic concepts of fairness, justice, and impartiality. A defendant may cross-examine a co-defendant who testifies adversely at a presentence hearing regardless of who called the witness to the stand. The matter is remanded for a new sentencing.

State v. Arizona Board of Pardons and Paroles
150 Ariz. Adv. Rept. 42 (Div. 1, 10/26/93)

The Board of Pardons and Paroles released a prisoner to home arrest. The local prosecutor petitioned to rescind the release because of the board's failure to notify the victim of her right to appear at the release hearing. The Victims' Bill of Rights applies to cases pending even before its adoption. Although the victim never requested notice, she was never informed of her right to request notice. The board did not take adequate measures to notify the victim of the release hearing. The proper remedy for the violation of the victim's rights is to have the result of the release hearing set aside and order a new hearing.

Editor's Note: Arizona Advance Reports summaries were prepared this month by Bob Doyle. Mr. Doyle, formerly *for The Defense*'s Appellate Review Editor, is now in private practice in Phoenix. A special thanks is owed to Mr. Doyle for all of his exceptional and faithful work for the newsletter. Ω

Give me Liberty to know, to utter and to argue freely according to my conscience, above all other liberties.

Milton

July Jury Trials

May 25

Joseph Stazzone: Client charged with murder in the second degree. Bench trial before Judge O'Melia ended July 29. Client found **not guilty** (under advisement since 5/26). Prosecutor Poulis.

May 31

Gary Bevilacqua: Client charged with two counts of aggravated assault. Investigator M. Fusselman. Trial before Judge Hall ended June 2. Client found **not guilty** of count one; and a hung jury on count two. (Count two subsequently dismissed.) Prosecutor V. Harris.

June 15

John Taradash: Client charged with sexual assault and kidnapping. Investigator J. Castro. Trial before Judge Ryan ended June 20. Client found **not guilty**. Prosecutor Garcia.

June 20

Tim Agan: Client charged with attempted murder and aggravated assault. Investigator J. Allard. Trial before Judge Dann ended June 23. Client found guilty. Prosecutor Mason.

July 5

Vicki Lopez: Client charged with possession of marijuana and possession of drug paraphernalia. Trial before Judge De Leon ended July 8. Client found guilty. Prosecutor Davidon.

John Movroydis: Client charged with two counts of aggravated assault (dangerous). Investigator B. Abernethy. Trial before Judge Topf ended July 13. Hung jury on count one; guilty of lesser included misdemeanor on count two. Prosecutor Dominy.

Karen Noble: Client charged with theft. Investigator B. Abernethy. Trial before Judge O'Toole ended July 7. Client found **not guilty**. Prosecutor Sullivan.

Greg Parzych: Client charged with possession of marijuana. Investigator G. Beatty. Trial before Judge Barker ended July 6. Client found guilty. Prosecutor Wells.

July 6

Tim Ryan: Client charged with aggravated assault (dangerous). Investigator T. Thomas. Trial before Judge Portley ended July 12. Client found guilty. Prosecutor Vincent.

James Wilson: Client charged with five counts of sale of narcotic drugs (with priors). Trial before Judge Howe ended July 12. Client found guilty. Prosecutor M. Armijo.

July 11

Gary Bevilacqua: Client charged with three counts of aggravated assault. Trial before Judge O'Toole ended July 14. **Judgment of acquittal** on count one, guilty of counts two and three. Prosecutor P. Howe.

July 12

Susan Bagwell: Client charged with two counts of negligent homicide, and one count of theft. Trial before Judge Dougherty ended July 25. Client found guilty. Prosecutor Duarte.

David Goldberg: Client charged with forgery. Trial before Judge Dann ended July 15. Client found guilty. Prosecutor Mitchell.

Thomas Timmer: Client charged with two counts of burglary, two counts of aggravated assault (dangerous), and one count of theft. Trial before Judge Silverman ended July 21 with a hung jury. Prosecutor Tinsley.

July 13

Kevin Burns: Client charged with two counts of aggravated assault. Investigator J. Castro. Trial before Judge O'Toole ended July 21. **Judgment of acquittal** on count one; guilty of lesser included disorderly conduct on count two. Prosecutor Richards.

Anne Whitfield: Client charged with armed robbery. Trial before Judge Sheldon ended July 14. Client found guilty. Prosecutor Smyer.

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July 18

David Anderson: Client charged with possession of marijuana and robbery (with priors). Trial before Judge Skelly ended July 21. Client found guilty of possession of marijuana; guilty of lesser included offense of theft; and **not guilty** on priors. Prosecutor McCurley.

Nancy Johnson: Client charged with burglary and misdemeanor assault (with priors). Trial before Judge Gerst ended July 19. Client found guilty of burglary, and **not guilty** of misdemeanor assault. Prosecutor V. Harris.

Anne Whitfield: Client charged with aggravated assault. Trial before Judge Barker ended July 20. Client found guilty. Prosecutor Baker.

July 19

Robert Corbitt: Client charged with kidnapping and robbery. Investigator T. Thomas. Trial before Judge Roberts ended July 27. Client found guilty. Prosecutor Martinez.

Sylvina Cotto (w/ Elizabeth Langford): Client charged with aggravated assault. Investigator G. Beatty. Trial before Judge Jarrett ended July 25. Client found **not guilty** of aggravated assault; client found guilty of lesser included offense (disorderly conduct). Prosecutor Smyer.

William Peterson: Client charged with transportation of marijuana for sale. Trial before Judge Schwartz ended July 20. Client found guilty. Prosecutor Davidon.

July 21

Slade Lawson: Client charged with attempted sexual assault and sexual abuse with person over 15 years of age. Investigator M. Breen. Trial before Judge Kaufman ended July 27. Client found guilty of misdemeanor assault. Prosecutor Williams.

July 22

Ray Schumacher: Client charged with DUI. Trial before Judge Passey (North Mesa Justice Court) ended July 22. Client found guilty. Prosecutor Gann.

July 25

Michael Hruby: Client charged with theft (with priors). Bench trial before Judge Gerst ended July 25. Client found **not guilty**. Prosecutor Blomo.

Anne Whitfield: Client charged with criminal trespassing. Trial before Judge Barker ended July 27. Client found guilty. Prosecutor Baker.

July 26

Joseph Stazzone: Client charged with seven counts of child molestation and two counts of sexual conduct with a minor. Trial before Judge Rogers ended August 4. **Judgment of acquittal** on one count of child molestation; guilty of all other counts. Prosecutor L. Schroeder.

July 28

Jeremy Mussman: Client charged with possession of crack cocaine. Investigator R. Barwick. Trial before Commissioner Jones ended August 2. Client found guilty. Prosecutor D. Schlittner. Ω

Bulletin Board

Subscriptions

for The Defense subscriptions expire at the end of September. Current subscribers who wish to continue the delivery of their monthly newsletter with no interruption should renew by September 15. New subscribers who wish to start regular delivery of *for The Defense* also will want to submit their subscription by September 15. The year's subscription (which runs from October 01 to September 30) is still only $15.00.

For subscriptions, please send your name, mailing address and a $15.00 check (payable to "Maricopa County") to

Maricopa County Public Defender's Office
132 South Central Avenue, Suite 6
Phoenix, Arizona 85004
ATTN: Heather Cusanek.

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Attorney Seminar

On September 23, 1994, our office, with special thanks to Parc Place, will sponsor a seminar for juvenile defense attorneys at Arizona State University. "Kids and Drugs" will be held at the College of Law's Great Hall from 8:00 a.m. to 4:15 p.m. For further information, contact Georgia Bohm at 506-8200.

Clothing Closet Update

In our last newsletter, we asked people to contact Janet Blakely regarding our office's Client Clothing Closet. *for The Defense* has since learned that the person in charge of the closet has changed. **Tim** Bein now is responsible for the maintenance of the closet. If you have any donations or clothing requests, please contact **Tim** in our records division. Ω

The Trial Notebook

Editor's note: More trivia

September 1

Aaron Burr, Vice President under Thomas Jefferson (1801-05), acquitted this date in 1807 of conspiracy to commit treason. Earlier Burr fatally wounded lawyer and first Secretary of the Treasury Alexander Hamilton in a duel.

September 5

The First Continental Congress convened in Philadelphia in 1774.

September 10

In Chicago, Leopold and Loeb, murderers of "little" Robert Franks, were sentenced to life imprisonment after a defense by Clarence Darrow against the death sentence this date in 1924.

September 13

Lewis E. Lawes (great name!), Sing Sing warden and reform penologist born this date in 1883.

September 15

The Nuremberg laws of Nazi Germany became effective, racially defining German citizenship and making Jews outcasts this date in 1935.

September 17

The Constitution was adopted by delegates of the Federal Constitutional Convention in Philadelphia this date in 1787.

September 21

Sandra Day O'Connor confirmed by the U.S. Senate this date in 1981 as associate justice of the U.S. Supreme Court.

September 24

The Judiciary Act of 1789 created the framework of the American Judicial system this date.

September 25

Noted American labor leader Eugene V. Debs' trial for violating a federal injunction in the Pullman Strike began in Chicago this date in 1894. Debs' conviction was later upheld by U.S. Supreme Court.

September 26

The anti-Vietnam War conspiracy trial of the Chicago Seven began this date in 1969 in federal court.

September 28

"Shoeless Joe" Jackson and seven other Chicago White Sox baseball players are indicted this date in 1920 for accepting bribes to throw the 1919 World Series played against the Cincinnati Reds. Ω

for The Defense August Index

Percentage increase of arrests of juveniles for all types of crimes between 1982 and 1991: 6%

Percentage increase of arrests of adults for all types of crimes between 1982 and 1991: 21%

Rate that the arrest rate grew for adults as opposed to juveniles for the years 1982 through 1991: 3¾ times faster

Percentage of violent crime arrests that juveniles account for: 17%

Number of states where a juvenile may be tried in adult court for a violent crime: 50

Number of forcible rapes reported to the FBI in 1992: 109,062

Number of wardens employed by Arizona Department of Corrections in juvenile and adult facilities in 1992: 54

Number of wardens employed by Arizona Department of Corrections in juvenile and adult facilities in 1992 who were white males: 37

Number of wardens employed by Arizona Department of Corrections in juvenile and adult facilities in 1992 who were white females: 8

Number of wardens employed by Arizona Department of Corrections in juvenile and adult facilities in 1992 who were black males: 4

Number of wardens employed by Arizona Department of Corrections in juvenile and adult facilities in 1992 who were black females: 0

Number of wardens employed by Arizona Department of Corrections in juvenile and adult facilities in 1992 who were male hispanics: 4

Number of wardens employed by Arizona Department of Corrections in juvenile and adult facilities in 1992 who were female hispanics: 1

Total number of correctional officers in Arizona in 1992: 3,317

*Sources: National Center for Juvenile Justice "Juveniles as Criminals, February 1994; U.S. Department of Justice: Bureau of Justice Statistics (June 1994); Bureau of Statistics 1992 Sourcebook. Compiled by the editor. Ω